UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BRENT A. CAMPBELL
United States Air Force

ACM 37460

31 January 2011

Sentence adjudged 19 February 2009 by GCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie.

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, Major Reggie D. Yager, and Major David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Major Naomi N. Porterfield, Major John M. Simms, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted of one specification of making a false official statement on divers occasions, one specification of larceny on divers occasions of military property under $500.00, and one specification of possession on divers occasions of controlled substances (Vicodin and Percocet), in violation of Articles 107, 121 and 112a, UCMJ, 10 U.S.C. §§ 907, 921, 912a. The adjudged and approved sentence consists of a dismissal.

The issue on appeal is whether there was an unreasonable multiplication of charges for findings. Finding no prejudicial error, we affirm.

Background

The appellant was a nurse assigned to the emergency room (ER). As a nurse in the ER, one of his duties was to comply with doctors' orders and provide medication to patients as directed. When a doctor orders medication for an ER patient, the nurse would access the Pyxis machine to fill the order and provide the medication to the patient. To access the Pyxis machine, the nurse would enter his user identification and scan his finger print. The nurse would then select the patient who was to receive the medication and enter the medication ordered by the doctor. The machine would dispense the requested medication and the nurse would retrieve it.

During the charged timeframe, 1 September to 3 December 2007, a number of patients were seen in the ER. One patient, LMS, visited the ER for an infection. During that visit, she received an antibiotic. A few days later, she visited her regular physician to get her sleeping medication refilled. Her doctor, after reviewing LMS's records, indicated he could not prescribe the sleeping medication as she had been prescribed Vicodin. LMS denied receiving Vicodin while at the emergency room. An inquiry was made and an investigation was conducted. As the result of an investigation, a number of discrepancies were discovered, and the appellant was charged with and convicted of the foregoing charges.

At trial, the defense counsel made a motion for dismissal/merger of the charges for unreasonable multiplication of charges and/or multiplicity. After considering the evidence and arguments on the motions, the military judge determined the charges were not multiplicious as each charge required proof of separate elements. He also determined that the charges, at that point, were not an unreasonable multiplication of the charges for findings. He stated he would reconsider the motion after he heard all the evidence. Prior to the presentencing phase of the trial, the military judge re-engaged and determined that the charges should be merged for sentencing purposes as they resulted from the same transaction and impulse. He then merged the charges and instructed the members that the charges were multiplicious. The defense counsel agreed with this solution to the previously raised motion.

Unreasonable Multiplication of Charges

"Unreasonable multiplication of charges is reviewed for an abuse of discretion." *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (quoting *United States v. Monday*, 52 M.J. 625, 628 n.8 (Army Ct. Crim. App. 1999)). Our superior court has noted that "even if offenses are not multiplicious as a matter of law with respect to double jeopardy concerns, the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—

reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4). In determining issues of multiplicity, we apply a five-part test which considers (1) whether a multiplicity objection was made at trial, (2) whether the specifications are aimed at distinct criminal acts, (3) whether the number of charges and specifications misrepresent or exaggerate the charged criminality, (4) whether the number of charges and specifications unreasonably increase the punitive exposure, and (5) whether the evidence shows prosecutorial overreaching or abuse in drafting the charges. *Pauling*, 60 M.J. at 95 (citing *Quiroz*, 55 M.J. at 338).

Here, we find no unreasonable multiplication of charges for findings purposes. As for the first part of the five-part test, we find that the trial defense counsel did make an objection to the charging at trial and the defense counsel concurred with the resolution proposed by the trial judge. That resolution was to find an unreasonable multiplication for sentencing purposes, thereby reducing the possible imposable sentence. The other factors weigh against the appellant. Specifically, we note that: (1) each charge and specification is aimed at distinctly different criminal acts – making a false official statement, larceny and illegally possessing controlled substances; (2) the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality; (3) the number of charges and specifications do not unreasonably increase the appellant's punitive exposure; and (4) there is no evidence of prosecutorial overreaching. In short, the military judge did not abuse his discretion by finding no unreasonable multiplication of charges for findings purposes. This is not a case of "unreasonable multiplication of charges by creative drafting." *United States v Morrison*, 41 M.J. 482, 484 n.3 (C.A.A.F. 1995). This is a case of "appropriately charging Appellant's overly-creative criminal activity." *Pauling*, 60 M.J. at 96.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.

Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the findings, and sentence, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court